EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4103202/2020 (V)

Held by means of the Cloud Video Platform on 2 September 2021

Employment Judge W A Meiklejohn

Major C Milroy	**Claimant Represented by: Ms T Burton of Counsel**
Advocate-General for Scotland	**Respondent Represented by: Mr B Napier QC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that -

(a) the claimant's claim brought under the Employment Rights Act 1996 is out of time and is dismissed; and

(b) the claimant's claim brought under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, although presented out of time, is allowed to proceed.

REASONS

1. This case came before me for an open preliminary hearing, conducted remotely by means of the Cloud Video Platform, to determine the preliminary issue of time bar. Ms Burton appeared for the claimant and Mr Napier for the respondent.

Nature of claims

2. The claimant's claims are brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PTWR") and the Employment Rights Act 1996 ("ERA"). He claims entitlement to an armed forces pension at a rate which takes into account pro rata all years served as an army reservist (the "pension claim"). He also claims that he was underpaid while serving as an army reservist because of (a) the way in which his daily rate of pay was calculated and (b) the payment he received for attending training days as compared with a full-time regular army officer (the "underpayment claim").

3. For the purposes of the time bar issues I had to decide, it is sufficient to say that the pension claim is brought under PTWR and the underpayment claim is brought under both PTWR and ERA.

Procedural history

4. A preliminary hearing took place on 15 December 2020 (before Employment Judge Ian McPherson) for the purpose of case management. The principal outcomes were that (a) timescales were set for both parties to provide further and better particulars, (b) a date for the present preliminary hearing on time bar was to be fixed, (c) the claimant was to provide a written witness statement and a bundle of documents and (d) the respondent's solicitor was to provide a written skeleton outline argument.

5. Both parties duly provided their further and better particulars. A date for the preliminary hearing was fixed, then subsequently changed to 2 September

2021. The claimant's written witness statement, the bundle of documents and the respondent's skeleton argument were also duly provided.

Preliminary issues

6. I noted that the skeleton argument which Ms Burton had provided in advance of the hearing inferred that there had been application by the respondent to strike out the claim under Rule 37 of the Employment Tribunal Rules of Procedure 2013. There was no such application within the case file. It was agreed that matters would proceed on the basis that there was no application for strike out (it being agreed that if I found that the claim was out of time and declined to extend time, the result would in effect be the same as granting an application for strike out).

7. The claimant had provided a supplementary witness statement to which the respondent made no objection. I agreed to receive this as part of the claimant's evidence-in-chief.

Service complaint

8. To comply with the requirements of Regulation 13(3) PTWR the claimant had submitted a service complaint under the service redress procedures referred to in section 334 of the Armed Forces Act 2006. In response to my enquiry about this Ms Burton advised that the service complaint had been stayed (sisted) pending the outcome of the claimant's Tribunal case.

Applicable law

9. Ms Burton provided a helpful summary of the law applicable in this case, with which Mr Napier took (almost) no issue. I repeat that summary here.

10. Until 1 July 2000 there was no specific protection for part-time workers in domestic law.

11. On 1 July 2000 the PTWR came into force. These Regulations implemented Directive 97/81/EC - the Part-time Workers Directive.

12. Regulation 8 of PTWR states -

"*(1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).*

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months (or, in a case to which regulation 13 applies, six months) beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*"*

13. The just and equitable extension in regulation 8(3) is the same form of words used as in section 123 of the Equality Act 2010 ("EqA"). Therefore, the case law under section 123 EqA is relevant for present purposes. I pause to observe that this was the point upon which Mr Napier sounded a cautionary note. He emphasised the fundamental importance of discrimination law in an international context. He accepted that protection of the rights of part-time workers was important but not, he argued, in the same way as discrimination. Accordingly the "*relaxed*" attitude to time limits reflected in EqA case law should be approached with care.

14. In respect of the failure to pay a pension for part-time judicial officers, in ***Miller v Ministry of Justice [2019] UKSC 60*** the Supreme Court concluded that the less favourable treatment against fee-paid judicial office

holders occurs during part-time service or at the time the pension falls to be paid. For the part-time judges in those cases, this was at the point of retirement.

15. In a linked appeal heard at the same time as ***Miller, Innospec Ltd v Walker [2017] UKSC 47*** Lord Kerr stated -

"Mr Chamberlain [counsel for Mr Walker] submitted that the appeal tribunal.... wrongly took Advocate General Van Gerven's description of pension benefits in the Ten Oever case....as "deferred pay" as equating the time at which a pension right accrues with the time at which any discrimination in the provision of resulting benefits is to be judged. I agree that the appeal tribunal was wrong to do so. The point of unequal ***treatment occurs at the time that the pension falls to be paid. If*** *Mr Walker married a woman long after his retirement, she would be entitled to a spouse's pension, notwithstanding the fact that they were not married during the time that he was paying contributions to his pension fund. Whether benefits referable to those contributions are to be regarded as "deferred pay" is neither here nor there, so far as entitlement to pension is concerned. Mr Walker was entitled to have for his married partner a spouse's pension at the time he contracted a legal marriage. The period during which he acquired that entitlement had nothing whatever to do with its fulfilment. " (para 56, emphasis added)*

16. The Supreme Court's conclusion in ***Miller came*** after the Court of Justice ("CJEU")'s decision in ***O'Brien v Ministry of Justice (Case C-432/17) .*** The argument that was accepted by the CJEU was that the Future Effects Principle ("FEP") applied to Mr O'Brien's pre-2000 service. The CJEU in its judgment in Cases C-395/08 and C-396/08 ***INPS v Bruno [2010] 3 CMLR 45*** at #53 *("Bruno and Pettini")* defined the FEP as follows:

"According to settled case-law, new rules apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule."

17. Employment Judge Macmillan at first instance stage of *O'Brien* summarised the law correctly on this point as follows:

"27. *The answer to the [Year 2000 Point] is to be found in Bruno and Pettini. It is clear from Art 7.1 of Legislative Decree No 463 that the periods of service of Ms Bruno and her colleagues prior to the date on which the Directive came into effect were relevant for the purpose of calculating their retirement pensions, that is they were relevant to the level of benefits they were to receive. They were also a qualifying period in that if Ms Bruno and her colleagues did not achieve a minimum level of qualifying weeks of work over their life-times they apparently got no pension at all (at least not under that scheme). The effect of those weeks was therefore identical to the first five years of service of a judge under the JPRA - they were both qualifying and reckonable.*

28. Mr Allen is therefore correct. Bruno and Pettini does unequivocally resolve the year 2000 question in Mr O'Brien's favour. By reading paragraph 55 of the judgment in the context of the first referred question and the Legislative Decree to which it relates, the effect of the Court's ruling is seen to be that the future effects principle means that where the calculation date for determining the amount of, as well as entitlement to, a pension falls after the date on which the PTWR came into effect, years of service prior to that date which had previously been excluded for a reason which the Directive now prohibits as unlawful, must be taken into account in the calculation for both purposes. Mr Allen's strictures about the misuse of terms such as "qualifying" and "reckonable" are also seen to be justified as the former is used in Bruno and Pettini to mean both.

29. Accordingly, the answer to the year 2000 question is that Mr O'Brien is entitled to a pension based on service in the office of recorder from 1st March 1978."

18. In respect of monetary claims in judicial pension claims, time runs from the end of each fee-paid appointment, irrespective of whether the claimant then transfers into a salaried appointment or has other fee-paid appointments that continue: ***Miller and ors v Ministry of Justice*** (Judgment handed down 30 December 2013). The appeal against this finding failed in the EAT and it was not appealed further to the Court of Appeal.

19. Time limits are applied strictly in the Employment Tribunal. An extension of time is the exception and not the rule. The onus is on the claimant to persuade the Tribunal that it is just and equitable to hear the claim: ***Bexley Community Centre t/a Leisure Link v Robertson 2003 IRLR 434.***

20. The factors contained within section 33 of the Limitation Act 1980, namely the length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party being sued has cooperated with requests for information, the promptness the claimant has acted with once he or she knew the facts giving rise to the cause of action and the steps taken by the claimant to take advice, may assist the Tribunal in deciding whether to exercise its discretion: ***British Coal Corporation v Keeble and ors 1997 IRLR 336.*** However, the Court of Appeal in January 2021 in the case of ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*** has cautioned against an overreliance and mechanistic application of the factors in section 33.

21. Ms Burton's summary focusses on PTWR. It does not address the law relating to the application of ERA to the underpayment claim. The relevant provision is section 23 which provides as follows -

"(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made ….

(3) Where a complaint is brought under this section in respect of-

(a) a series of deductions ….

the references in subsection (2) to the deduction.... are to the last deduction ….in the series. …

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable. "

Evidence

22. I heard evidence from the claimant. His evidence-in-chief was contained in his written witness statement and his supplementary witness statement, both of which were taken as read in accordance with Rule 43.

23. I had a bundle of documents from the claimant extending to 242 pages to which I refer below by page number.

Findings in fact

24. The claimant was a member of the Army Reserve (formerly the Territorial Army - "TA") from 9 May 1982 until 1 November 2019. Since 1990 he held the rank of Major.

25. Most of the claimant's civilian career was in the Scottish water industry as a Chartered Civil Engineer and Chartered Environmental Manager. He retired from Scottish Water in March 2010, having applied successfully for voluntary redundancy. He set up his own company which specialised in

advising businesses on recruitment selection processes, leadership development and personal development. He also worked as a short term technical adviser on water related programmes with USAID (United States Agency for International Development).

26. Upon retiral from Scottish Water, the claimant accessed his occupational pension. For a period in 2007/08 the claimant was mobilised and served full-time. During this period he had the option of joining the Armed Forces Pension Scheme 1975 ("AFPS 1975") or remaining in the Scottish Water pension scheme and having the Army pay his pension contributions to that scheme. He chose the latter.

27. Prior to April 2015 there was no pension provision for members of the TA. This changed with effect from 1 April 2015 and the claimant did accrue pension entitlement from that date, based on his earnings as a member of the Army Reserve. He accessed this pension following his retiral from the Army Reserve on 1 November 2019. He received the first payment of this pension on 18 December 2019 (being payment of arrears in respect of November 2019) and it has been paid at or around the end of each calendar month since then.

Mcleod, Quayle & Niblock v Ministry of Defence

28. These were Employment Tribunal claims brought by current and former TA members (cases nos 1802732/04, 1803506/05 and 1803891/05) in which they complained about their exclusion from the Armed Forces Pension Scheme. The claimant became aware of these claims *"in the mid-2000's, while I was serving at Westbury".* He was unaware that one of the bases under which these claims were brought was PTWR. He believed that the claims had been brought under *"equal opportunities legislation as the Claimants asserted that the lack of pension provision was more prejudicial to female TA members".*

29. The claimant referred to a *"speculative discussion"* in the mess. His understanding was that the claims failed because TA soldiers/officers were classed as casual workers. He said that he thought *"pursuing the matter was a lost cause and therefore did not seek legal advice during my service".* He *"lost interest".*

Conversation at barbecue

30. In August 2019 at a barbecue hosted by the claimant there was a conversation which included a number of the claimant's ex-colleagues in the reserve forces, some of whom were legally qualified. The claimant was present during part of this conversation and became aware of ***O'Brien.*** He understood that this case concerned Recorders being determined as part-time workers and therefore enjoying entitlement to a pension. The conversation included discussion about the application of this to TA service.

31. The potential significance of this to the claimant's own position did not register with him at this time. He described it as a *"ship that drifted across the horizon".* His focus was on building up his consultancy work. He was also busy preparing for the handover of his portfolio of work with City of Edinburgh Universities Officers' Training Corps and acting as Investigating Officer in a service complaint.

Claimant notified of pension benefit

32. On 11 or 12 December 2019 the claimant received a letter from Veterans UK, the administrator of the Armed Forces Pension Scheme, advising him of the amount of his pension benefit. He referred to reflecting that *"the final pension award was very meagre considering I had completed 37 years' service".*

33. Two things flowed from this. The first was that on 12 December 2019 the claimant spoke to a friend who had been a TA colleague and had been at the August 2019 barbecue. The friend was a barrister at Trinity Chambers

specialising in family law. They spoke about the barbecue conversation. They decided jointly to seek counsel's opinion *"on the implications of* ***O'Brien*** *and to see if it was worth pursuing a service complaint and application to an Employment Tribunal".* The claimant's friend recommended Richard Stubbs, a fellow barrister at Trinity Chambers.

34. The other thing which flowed from the notification to the claimant of his pension benefit was that he started to research ***O'Brien,*** the Army Regulations and PTWR. His evidence was that he was *"giving serious thought to pursuing a complaint".* He also said that *"taking on a large organisation rd served for 37 years was a big deal"* and that he *"struggled, waxed and waned, with the loyalty and integrity issue".*

Consultation with counsel

35. The claimant had a consultation with Mr Stubbs on 28 January 2020. His description of this was *"not at all encouraging".* He said he had been told that time ran (for the purpose of a pension claim) from 1 April 2015 when he began to accrue pension entitlement and he was therefore out of time.

36. On 4 February 2020 the claimant sent a note of his meeting with counsel to his legally qualified friends asking for comments. On 11 February 2020 one of them replied suggesting that he should look at the Supreme Court's decision in ***Miller.*** The claimant did so and decided to look at the video of Lord Carnwath's judgment. He took from this that the critical date was his point of retirement rather than when his Army Reserve pension entitlement first came into effect.

37. On 20 February 2020 the claimant wrote to Mr Stubbs providing a link to ***Miller and*** asked if he would change his opinion on being out of time. On 9 March 2020 he sent a draft of his service complaint (165-172) to Mr Stubbs. On 12 March 2020 the claimant's friend who had read his note of his meeting with Mr Stubbs suggested that the claimant should make contact with Beers Solicitors as they had been involved in the ***O'Brien*** case and

had acted for Mr Miller. On 16 March 2020 the claimant received a reply from Mr Stubbs which "was *again not encouraging".*

Contact with soiicitors

38. On 27 March 2020, shortly after the start of the first period of lockdown related to the coronavirus pandemic, the claimant contacted Beers. He spoke with Ms N Nethercott who he understood to be a paralegal. He sent her Ms Nethercott his draft service complaint.

39. The claimant spoke with Ms Nethercott again on 3 April 2020. She told him that either Mr S de Lacey of Mr P Housego of Beers would get back to him in a week or so and that she was about to be furloughed. The claimant understood that Ms Nethercott was furloughed as from 4 April 2020.

40. On 21 April 2020, not having heard from Beers, the claimant contacted ACAS. His early conciliation ("EC") certificate (3) records the date of his notification to ACAS as 21 April 2020 and the date of issue of the EC certificate as 22 April 2020.

Claimant's work issues

41. The claimant described the impact of the coronavirus pandemic on his business in his supplementary witness statement in these terms, the accuracy of which I found no reason to doubt -

"4. With the advent of the pandemic, many of my clients withdrew to core business and my management, mentoring and interview work was not required. This included substantial contracts to my business including a management workshop with USAID in New Delhi, as India had shut their borders to the UK.

5. The intervening period, as well as the below, I was essentially fighting to ensure my business stayed above water.

6. This included a substantial contract with DT Global as a short-term technical adviser, associated to the New Delhi contract referenced at #4. Prior to entering into the agreement on 18 May, I had to, essentially, re-read myself into the background of water supply in Afghanistan and national law surrounding it.

7. This was on top of attempting to secure extra work and keep in touch with existing clients.

8. For the first time since 2010, I was working full-time as well as trying to secure further work. This only added to the pressures of the pandemic. It is pertinent to note, that self-employed support under the government schemes was lacking for self-employed individuals at this time."

Claimant's domestic issues

42. The claimant also described issues involving his elderly mother who was *"classed as extremely clinically vulnerable".* She lived 40 miles away from the claimant and was not willing at the start of lockdown (in March 2020) to move to the claimant's home. The claimant's mother continued to use the services of a mobile cleaner and the claimant and his brother were concerned that this posed a high risk of bringing Covid-19 into their mother's home.

43. The claimant said that he and his brother spent time at the start of the pandemic trying to install Wi-Fi for their mother and dealing with other necessities to make her as comfortable as possible and limit her need to leave the house. He described his mother regretting her decision (not to move to live with the claimant) within a week of being isolated. The claimant and his brother were concerned for her mental health. During lockdown, despite the distance, the claimant undertook shopping and

prescription collection for his mother until he was able to relocate her to his home on 3 June 2020.

44. The claimant also described issues with his son who was a student at Dundee University. His son was forced to self-isolate in his flat. He had recently given up his job and was due to begin a summer term at Magdeberg, Germany as part of the Erasmus scheme. The claimant referred to his son having *"material changes in behaviour"* and in consequence gaining weight. The claimant said that he was extremely concerned for his son's wellbeing and this added to the stress he was under.

Clamant submits his ET1

45. The claimant presented his ET1 claim form on 5 June 2020. It was common ground that the time limit for his claim under PTWR expired on 1 May 2020. The claimant made reference to his claim being late in both his written witness statement and his supplementary witness statement.

46. In his written witness statement the claimant said this -

"31. ….I submitted my employment tribunal claim as soon as I could have fully digested the claims in Miller, and only one month after contacting Beers. It is only after this that I was told that my lack of knowledge of part-time worker regulations, could give rise to a just & equitable extension of time."

32. These claims, as I understand, are different to a typical discrimination complaint, such as race, where the Claimant knows they have been discriminated against. I had no knowledge of my right to bring a claim under the part-time workers regulations, and had I known, I would certainly have done so…."

47. In his supplementary witness statement, after describing his work and personal issues, the claimant said this -

"15. Given the above, my personal and professional life was acutely affected by the covid-19 pandemic, in many respects over and above what many other employed, or self-employed, professionals experienced.

16. I had not heard back from Beers, and had no professional support or instruction at this time.

17. I had rather lost sight of the employment tribunal claim until I finished a piece of work for USAID on 4 June and submitted my ET1 soon thereafter. "

48. Under cross-examination the claimant said going to ACAS came from his discussion with Mr Stubbs. He had been told that he would need to *"lodge with ACAS"* before going to the Employment Tribunal. He submitted his ET1 *"to prevent further delay".*

49. The claimant also said under cross-examination that when he received his EC certificate (on 22 April 2020) he did not lodge his ET1 due to the pandemic. He said there was "a *lot going on".* He had heard nothing from Beers. He said he had *"lost sight of time"* and that the *"clock was not ticking down in my head".*

50. I found that the claimant was aware from the time of the conversation with his barrister friend on 12 December 2019 that he might have a claim under PTWR. Following his consultation with Mr Stubbs on 28 January 2020, he understood that it was too late for him to bring such a claim. He had cause to question this understanding at some point between 11 February 2020 (when he became aware of ***Miller)*** and 20 February 2020 (when he wrote to Mr Stubbs providing a link to ***Miller*** and asking if he would change his opinion).

51. By the time the claimant received a response from Mr Stubbs on 16 March 2020 which was *"again not encouraging"* the claimant had been recommended, on 12 March 2020, to contact Beers. He did so on 27 March

2020 which indicated that, notwithstanding the opinion of Mr Stubbs, he was minded to take matters further. At this point, the claimant was aware that he might be able to bring a claim under PTWR but unaware of the time limit within which he had to do so. He was aware of the need to contact ACAS before presenting a claim to the Tribunal (having been so advised by Mr Stubbs) but not aware of any correlation, in terms of timescale, between contacting ACAS, receiving the EC certificate and presenting his claim.

Submissions

52. I am grateful to Ms Burton and Mr Napier for providing helpful submissions both written and oral. These focussed on the time limit under PTWR and whether I should exercise my discretion under Regulation 8(3) PTWR to extend time if I considered that it was just and equitable to do so. Ms Burton made a number of points in her written submissions to which Mr Napier responded orally and I propose to set out each of Ms Burton's points (in ***bold*** type but omitting the cross-references to the claimant's witness statement) and Mr Napier's responses.

(a) Unlike the litigants in the O'Brien and Miller litigation, the claimant is not a lawyer and has no formal legal training. He spent the majority of his civilian career working for Scottish Water. During the O'Brien and Miller litigation there was a concern expressed by Employment Judge Macmillan (who heard these cases at first instance) that the litigants in those cases as judges should not be given special treatment. As judges, they had greater knowledge about litigation and time limits than the ordinary litigant: see #41 and #44 of Employment Judge Macmillan's decision in R Miller v Ministry of Justice Case no. 1700853/2007. However, it is submitted that a more sympathetic approach should be taken in this context to this litigant, who is not a qualified lawyer.

53. Mr Napier argued that the force of this submission about the claimant not being a lawyer was diminished because, by February 2020, he had studied

the PTWR and relevant case law and was aware that the time issue was critical to his claim. This was demonstrated by the claimant sending Mr Stubbs the link to ***Miller*** on 20 February 2020, which demonstrated an awareness of the legal importance of time limits.

(b) After the 12 December 2019 discussion when the claimant spoke to a family law barrister about O'Brien, the claimant then did what any reasonable litigant would do and he sought legal advice. He received negative advice on two occasions. In the case of Bowden (a judicial pension claim) Employment Judge Macmillan considered a hypothetical argument presented on behalf of the claimant: if that claimant had taken legal advice that advice would have been negative and he would not have brought a claim. Employment Judge Macmillan concluded that this point was fanciful because Mr Bowden had not in fact taken legal advice. However, the facts of this case are different. The Claimant here did take legal advice; twice. The Claimant should not be put in a worse position because he took legal advice over the period of 28 January 2020 to 16 March 2020.

54. Mr Napier submitted that the claimant might have received mistaken advice, but that was not of itself a reason to extend time. He should not be in a better position because he received mistaken advice. It was not for the Tribunal to put right every misfortune suffered by a claimant. By seeking advice, the claimant had demonstrated an awareness of time limits. He should have acted with expedition.

(c) There is only a small period of delay in this case, a period of around 1 month and four days. In the case of Robins (a part-time judge claim heard by Employment Judge Macmillan as part of R Miller v Ministry of Justice) a just and equitable extension was granted when the claimant presented his claim six weeks out of time.

55. Mr Napier referred to ***Bexley Community Centre v Robertson.*** The starting point was that time limits should be observed. Mr Napier accepted that the length of the claimant's delay was relevant but pointed out that the applicable time limit in this case (six months) was already longer than the normal three months, and this should be a consideration. Mr Napier argued that the granting of longer extensions in other cases was unhelpful; there was no doctrine of precedent here.

(d) The Covid-19 pandemic played a role in the delay for the Claimant presenting his claim within the primary limitation period. The claimant was left waiting for a response from Beers LLP due to furlough and presented his claim to the tribunal on his own without legal assistance.

56. Mr Napier acknowledged the impact of Covid-19. It had made life more difficult. However the Government had not relaxed Employment Tribunal time limits due to Covid-19 and lockdown. In any event some of the reasons for delay contended for by the claimant took place before lockdown (in March 2020).

(e) But for the alleged discrimination in this case, the Claimant would have been entitled to receive a pension on his 65th birthday under the AFPS 1975 for the entirety of his service. As he has not yet reached his 65th birthday, any claim would still be in time. However, due to the fact he received a modest pension for his 2007-2008 mobilised service only, he elected to receive those sums within his civilian pension scheme in 2010 when he retired from Scottish Water. It is submitted that, but for the alleged discriminatory treatment, the Claimant would have been entitled to receive pensionable service from 1982 to 2015 (including his mobilised service) and all sums would have fallen to be paid on his 65th birthday. In contract, as a result of the alleged discriminatory treatment, the Claimant chose to take his 2007-2008 as part of his civilian scheme. It is submitted that this is a relevant consideration

for the tribunal in considering what is just and equitable as the Claimant's actions in taking his 2007-2008 early and not on his 65th birthday (which would bring the claim in time) flow from the alleged discriminatory he has suffered.

57. Mr Napier understood this point to be that, but for the alleged discrimination, the claimant would not have elected to take his 2007-2008 pension and therefore put himself in a worse position by his election. Mr Napier argued that this was not supported by the claimant's witness statements. He also argued that this begged the question, ie it assumed what had yet to be proved, about the alleged discrimination. It should not, Mr Napier submitted, be relied upon as a factor supporting the argument for a just and equitable extension of time.

(f) In relation to the Defendant's (Respondent's?) conduct, which is a factor for consideration under s.33 of the Limitation Act 1980, there has been a modest delay in relation to the service of the ET3. This was due on 8 July 2020 but was received on 14 July 2020 due to difficulties with Covid-19. The Claimant consented to the extension of time in view of the difficulties posed by Covid-19.

58. Mr Napier noted that the claimant had not objected to the ET3 being received late. He said it was not clear what point was being made here. If it was *"tit for tat"* then he observed that the system did not work like that. He referred to EJ McPherson's Note following the preliminary hearing on 15 December 2020 which recorded a series of administrative mishaps in the progress of the case.

(g) There is no prejudice to the Respondent. This is a case that will turn predominantly on an analysis of the rules of the pension scheme and the applicable law rather than oral conversations and human memory.

59. Mr Napier accepted that the case would turn on legal argument but argued that there would be prejudice to the respondent if it was allowed to proceed in that the respondent would be denied a valid time limit defence to the claim.

(h) If the tribunal concludes that it is Just and equitable to extend time, the Respondent will be able to defend itself in the substantive hearing. If the extension of time is not granted, the Respondent will get a windfall. It is understood that the Respondent is facing similar cases of other litigants in the Claimant's position which are in time. The Respondent will therefore] have to defend these cases even if the Claimant's case is struck out: see by analogy the decision of Henderson J in Test Claimants in the Act Group Litigation and ors v The Commissioners for Her Majesty's Revenue and Customs [2020] EWHC 359 Ch at #88.

60. Mr Napier pointed out that the granting or refusing of an extension of time will always mean a windfall for one party or the other. He was unaware of other cases but if there were such cases, they would be answered on their facts.

61. Both sides dealt fairly cursorily with the issue of time bar in the ERA claim, recognising the shorter primary limitation period of three months and the stricter *"not reasonably practicable"* test which applied.

Discussion and disposal

62. I deal firstly with the ERA claim. This was one of the bases upon which the underpayment claim was brought. The starting point for calculating the primary time limit for this claim was the date of payment of the wages from which the deduction was made - section 23(2)(a) ERA. The evidence did not disclose the exact date of the last payment of wages received by the claimant but it seemed probable that this would be at or around the end of

October 2019, ie shortly before the claimant's retirement date of 1 November 2019.

63. For the sake of completeness I should add that the underpayment claim could not be pursued under ERA in relation to payment of pension after the claimant's retiral from the Army Reserve on 1 November 2019. This is because section 27(1) ERA excludes from the definition of *"wages"* any payments within subsection (2), and section 27(2)(c) ERA refers to *"any payment by way of a pension.... in connection with the worker's retirement...."*.

64. In terms of section 23(2) ERA the primary time limit was the end of the period of three months beginning with the date of that last payment of wages. Section 23(4) ERA allows the Tribunal to extend time *"Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months"*. The question of whether it was reasonably practicable for the claimant to present his claim within the time limit is one of fact - ***Wall's Meat Co Ltd v Khan 1979 ICR 52.*** Per Lord Shaw in that case -

"*The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. "*

65. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. Per ***Porter v Bandridge Ltd 1978 ICR 943*** - *"That imposes a duty upon him to show precisely why it was that he did not present his complaint"*.

66. The Court of Appeal in England in ***Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372*** concluded that *"reasonably practicable"*

meant something like "***reasonably feasible".*** In ***Asda Stores Ltd v Kauser EAT 0165/07,*** Lady Smith explained it in these words -

"....the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

67. In the present case, the claimant was not short of legal advice within the time frame for lodging an ERA claim timeously. He spoke with his family law barrister friend on 12 December 2019. That conversation related to implications of ***O'Brien*** and whether it was worth pursuing an application to the Employment Tribunal. He had a consultation with Mr Stubbs on 28 January 2020. Another legally qualified friend suggested to the claimant on 11 February 2020 that he should look at ***Miller.*** On 20 February 2020, still within the primary limitation period, the claimant reached out to Mr Stubbs again.

68. From ***Dedman v British Building and Engineering Ltd 1974 ICR 53*** there is derived the general principle that a claimant who has put his case in the hands of a solicitor cannot plead ignorance if the solicitor gets it wrong. I see no reason why the same should not apply where the advice has come from counsel.

69. This *"Dedman principle"* has been revisited by the courts on a number of occasions and was questioned by the Court of Appeal in ***Riley v Tesco Stores Ltd 1980 ICR 323*** and ***London International College Ltd v Sen 1993 IRLR 333.*** However, the principle was confirmed by the Court of Appeal in ***Marks and Spencer PLC v Williams-Ryan 2005 ICR 1293.*** In ***Northamptonshire County Council v Entwhistle 2010 IRLR 740*** the Employment Appeal Tribunal (per Underhill J, then President) confirmed the principle but emphasised that the question of reasonable practicability is one of fact for the Tribunal that falls to be decided on the particular circumstances of the case.

70. Taking account of this, my view in this case is that it offends against *"practical common sense"* to say that it was not reasonably practicable for the claimant, who had a significant amount of legal advice, to present his claim within the primary limitation period under ERA. There was virtually nothing in the claimant's evidence to show why it had not been reasonably practicable to present his ERA claim timeously. I suspect from the brief reference to this in her submissions that Ms Burton recognised that this was unlikely to be fertile ground for the claimant

Decision on ERA claim

71. My conclusion is that it had been reasonably practicable for the claimant to present his ERA claim timeously and, he having failed to do so, that claim has been brought out of time and requires to be dismissed.

72. Moving on to the PTWR claim, I agreed with Mr Napier that the starting point - per ***Bexley Community Centre v Robertson*** - was that time limits should be observed. Ms Burton was partly correct in saying that the same words were used in PTWR as in EqA - both refer to *"just and equitable".* However, in EqA this is expressed in terms of the claim *"not being brought after the end of….such other period as the employment tribunal thinks just and equitable".* In PTWR the Tribunal can consider a complaint which is out of time *"if, in all the circumstances of the case, it considers that it is just and equitable to do so".*

73. In determining whether to exercise its discretion to extend time under EqA, a Tribunal will have regard to *"all the circumstances of the case"* notwithstanding that EqA does not contain these words. In exercising its discretion under PTWR, the Tribunal will in effect decide within what *"other period"* the claim may be brought. Accordingly I did not believe that there was any material difference between these forms of words.

74. 1 reminded myself of Ms Burton's cautionary note about overreliance on or taking a mechanistic approach when applying the factors listed in section

33(3) of the Limitation Act 1980. The list should not be followed slavishly - ***Southwark London Borough Council v Afolabi 2003 ICR 800.*** However, I considered it appropriate to remind myself of those factors -

- The prejudice which each party would suffer as a result of the decision reached.
- The length of, and reasons for, the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued has cooperated with any requests for information.
- The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- The steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Having done so, I considered each of these factors in the context of this case, so far as relevant, as well as looking at other relevant considerations.

Balance of prejudice

75. If I extended time, the respondent would require to answer a claim brought out of time. If I refused to extend time, the claimant would lose the right to pursue that claim. These considerations were equally balanced. I deal with a further *"balance of prejudice"* point at paragraph 90 below.

Length of and reasons for delay

76. I considered that, while both were relevant, the reasons for the delay were arguably more important than the length of the delay. By that I mean that I might be more readily persuaded to extend time in circumstances where the

delay was longer but for valid reasons, compared with where the delay was shorter but without valid reasons.

77. I looked at the reasons for the delay in this case, and identified the following. Firstly, there was the claimant's state of knowledge as to his right to bring a PTWR claim. I believed this could fairly be described as *"confused".* On the one hand, he believed he might have a statable claim, particularly after being referred to *Miller.* On the other hand, the advice from Mr Stubbs poured cold water on this. I considered that he was probably encouraged by being steered towards Beers who had acted for Mr Miller. He clearly wanted their advice because he made contact with them on 27 March 2020 and again on 3 April 2020.

78. Secondly, there was the claimant's state of knowledge as to the existence of the time limit. The claimant became aware through his consultation with Mr Stubbs that he needed to contact ACAS before commencing a Tribunal claim. He did not become aware that time (for presenting a claim) was running as at the time of that consultation. That was because the advice he received was that he was already out of time. That demonstrated awareness that there was a time limit but not necessarily as to (a) what that time limit was and (b) how that might apply in his own case.

79. Thirdly, there was the impact of the pandemic. This affected the claimant in a number of ways. It created significant turbulence in his work and personal life. The claimant's evidence about this was expressed in measured terms and was entirely credible. Like the rest of the country, he found himself in uncharted waters when dealing with the impact of lockdown restrictions. His ability to obtain the advice he sought from Beers was impacted by his contact within the firm being placed on furlough. There was a lot going on his life which was unexpected and challenging and the need to get on with a Tribunal claim was not at the forefront of his mind.

80. While Mr Napier's point that the Government had not relaxed Employment Tribunal time limits due to Covid-19 and lockdown was of course correct, it

may be argued that there was no need to do so. The availability of a *"just and equitable"* extension of time gives Employment Tribunals the opportunity to take into account the impact of the pandemic when dealing with a time bar issue. In this case I found that impact was not the sole reason for the claimant's delay in presenting his PTWR claim, but was a significant factor in that delay.

81. Given the factors at play here, I did not consider the claimant's delay of one month and four days to be excessive.

Cogency of evidence

82. I found there was no adverse impact on the cogency of the evidence which would be required in this case by reason of the claimant's delay. There was little if any factual dispute. Indeed, it seemed to me that it might well be possible for there to be an agreed statement of facts so as to obviate the need for witness evidence at a final hearing.

Cooperation with requests for information

83. This was not applicable in the present case.

Promptness with which the ciaimant acted

84. Given what I have said at paragraph 81 above, I have nothing to add under this heading.

Steps taken to obtain appropriate advice

85. I have set out the steps taken by the claimant at paragraphs 35-39 above. When the claimant contacted Beers on 27 March and 3 April 2020, there was still time for his PTWR claim to be presented timeously. I had no evidence about what happened after 3 April 2020 (in terms of Beers being able to provide advice) apart from (a) the person to whom the claimant

spoke was placed on furlough and (b) the claimant not being contacted thereafter (see paragraph 47 above).

86. I did not believe it was appropriate to speculate as to why the claimant was not given advice following his contact with Beers beyond noting that the pandemic and lockdown restrictions were likely to have had an adverse impact. My view was that the claimant took reasonable steps to obtain legal advice and this was a factor in his favour when assessing whether it was just and equitable to extend time.

Other considerations

87. I took account of the arguments advanced by Ms Burton and Mr Napier, so far as not already discussed above. The fact that the claimant was not a lawyer seemed to me to be a neutral point. It would be fair to have a greater expectation of legal knowledge about time limits from a legally qualified claimant, but that did not necessarily entitle the claimant to more lenient treatment, compared with any other claimant, just because he was not legally qualified. It was apparent that the claimant had a number of legally qualified acquaintances with whom he was in contact at the relevant time. That indicated that he was probably better placed than the average non-legally qualified person to have some understanding of Tribunal time limits.

88. There did not appear to be any substance in the reference to the claimant becoming entitled to a pension on his 65th birthday. He chose to have his civilian pension contributions paid during the period when he was mobilised in 2007/08 rather than joining the AFPS 1975. That would have been reflected in the pension he received when he retired from Scottish Water. He had no deferred pension entitlement under AFPS 1975.

89. The point made about the short delay in the submission of the respondent's ET3 was not in my view relevant. It did not have any bearing on the timing of presentation of the claimant's ET 1.

90.1 noted the reference to the respondent facing other similar claims. Based on the outcome of the ***O'Brien*** and ***Miller*** litigation, it seemed to me that if one or more of those other claims were to succeed, it was quite likely that the Ministry of Defence would treat all Army reservists who were eligible for pension in the same way, regardless of whether they had brought an individual claim. That was what the Ministry of Justice had done in case of part-time judicial office holders. This was a consideration which counted against the respondent in terms of the balance of prejudice.

Decision on PTWR claim

91.1 considered that the claimant had demonstrated reasonable grounds for having failed to present his claim in time, in particular those described at paragraphs 77-79 above. The cogency of evidence was not adversely affected. The claimant had not delayed unreasonably. He had taken reasonable steps to obtain legal advice. The issue was going to be litigated anyway.

92. Looking at matters in the round and taking all of the foregoing into account, I decided that it was just and equitable to extend time and to allow the claimant's PTWR claim to proceed.

Employment Judge: Sandy Meiklejohn

Date of Judgment: 06 October 2021

Entered in register: 13 October 2021

and copied to parties